In the Supreme Court of the United States

SCHENLEY INDUSTRIES, INC., ET AL., *Petitioners*

v.

CARLTON DISTILLERS CORPORATION

SCHENLEY INDUSTRIES, INC., ET AL., *Petitioners*

v.

SEAGRAM DISTILLERS CORPORATION

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Memorandum for the United States of America Curtis in Support of the Petition for Writs of Certiorari

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL., *Petitioners*

v.

CALVERT DISTILLERS CORPORATION

No. 443

SCHWEGMANN BROTHERS, ET AL., *Petitioners*

v.

SEAGRAM DISTILLERS CORPORATION

On Petition for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Memorandum for the United States as Amicus Curiae in Support of the Petition for Writs of Certiorari

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The question presented in these cases is whether the Miller-Tydings Act applies to and therefore exempts from the prohibitions of Section 1 of the Sherman Act, the non-signer clause of the Louisiana fair trade statute. That clause gives a right

of action against a person, not a party to a resale price maintenance contract authorized by the statute, who knowingly sells a commodity at less than the price stipulated in such a contract. Forty-five states have enacted fair trade statutes containing a non-signer clause substantially identical (except in two states) with that of the Louisiana statute here involved. *Report of the Federal Trade Commission on Resale Price Maintenance* (1945), pp. 74-75; 2 CCH Trade Reg. Serv., pars. 7011, 7096, and pp. 7503 *et seq.* Thus a ruling by this Court on the question which the petition for certiorari presents will determine whether the non-signer clause of the fair trade laws of at least 43 states comes within the exemptions from the antitrust laws given by the Miller-Tydings Act.

It has long been settled that the Sherman Act makes it unlawful to enter into any agreement, express or implied, limiting or fixing the price at which the purchaser of a commodity may resell.[1] The bar applies even as against rights asserted under copyright (*Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339; *Interstate Circuit* v. *United States*, 306 U. S. 208, 221) or patent (*Ethyl Gasoline Corp.* v. *United States*, at pp. 456-457; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 250). The rule laid down by Congress thus covers the entire field

[1] *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183, 188-189; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 721.

of interstate and foreign commerce "except as the seller moves along the route which is marked by the Miller-Tydings Act." *United States* v. *Bausch & Lomb, supra,* at p. 721.

As to interstate and foreign commerce, Congress has, therefore, occupied the "legislative" field and has barred the door to inconsistent state legislation, except as authorized by the Miller-Tydings Act. A state may not "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker* v. *Brown,* 317 U. S. 341, 351.

The construction which the court below placed upon the Miller-Tydings Act raises an issue of major public importance in the interpretation of the antitrust laws. Whether or not the exemption conferred by the Miller-Tydings Act embraces the non-signer provisions of state fair trade statutes is of wide significance to business, to consumers and to the federal government. In many of the proceedings brought by the Government under the Sherman Act the defendants claim full or partial immunity for their conduct under the Miller-Tydings Act.[2] In addition, it is a matter of grave concern to the Government that statutory exemptions from the antitrust laws be confined to their true limits. For these reasons and because the

[2] See *Univis Lens* case, *supra,* at pp. 247, 252-254; *Bausch & Lomb* case, *supra,* at pp. 723-724; *United States* v. *Frankfort Distilleries, Inc.,* 324 U. S. 293, 296-297.

Government believes that the decision below is erroneous it is submitting this memorandum in support of the petition for certiorari.

The Miller-Tydings Act, which was enacted through the medium of a rider to a revenue bill for the District of Columbia (50 Stat. 673, 693), amends Section 1 of the Sherman Act by providing that nothing "herein contained" shall render illegal "*contracts or agreements*" prescribing minimum resale prices for a commodity bearing the producer's or distributor's trademark, brand or name when "contracts or agreements" of that description are legal "as applied to intrastate transactions," under any "statute, law, or public policy" of the state of resale. The Act further provides that "the making of such contracts or agreements" shall not be an unfair method of competition under Section 5 of the Federal Trade Commission Act. Certain qualifications and limitations upon the exemptions thus created are not pertinent here.

The present petitioners, operators of a large retail store in New Orleans, Louisiana, have not entered into any resale price maintenance contract or agreement applicable to the sale of respondents' products. The district court nevertheless enjoined petitioners from selling respondents' products "at prices less than the minimum prices" for such products stipulated in resale price maintenance contracts made between respondents and retailers other than petitioners (Calvert R. 81; Seagram

R. 78). On appeal, the court below affirmed the judgment by a divided vote upon the ground that the Miller-Tydings Act removed from the scope of the Sherman Act any action which a state fair trade law validates as to intrastate commerce (Calvert R. 101-102).[3]

We think that the decision below does violence to the plain language of the Miller-Tydings Act. That Act explicitly defines the conduct given exemption, namely, "contracts or agreements" for resale price maintenance which are permissible under the law of the locality. The Act, by its terms, removes the bar of the Sherman Act as to such contracts, which are voluntary obligations, and does nothing more. When a state provides by legislative fiat that in certain circumstances strangers to a retail price maintenance contract may not sell at less than the price stipulated in contracts of this character made by others, such state-created cause of action is not within the statutory exemption of "contracts or agreements prescribing minimum prices for the resale of a commodity." The parallelism between the language of the Miller-Tydings Act and that of Section 1 of the Louisiana statute making it lawful to enter

[3] The court held that the transactions which were the subject of the proceedings brought by the respondents so affect interstate commerce and the exercise of federal power over it as to bring them "within the reach of the Sherman Act, unless the Miller-Tydings Amendment to that act excludes them" (Calvert R. 98-99).

into a "contract" for resale price maintenance,[4] further indicates that it is such *contracts* which the federal statute exempts, not an *in invitum* obligation with respect to minimum sales price imposed by the state on persons not parties to such a contract.

We submit that Judge Russell, dissenting in the court below, correctly construed the scope of the exemption conferred by the Miller-Tydings Act. He said (Calvert, R. 105):

> Thus Congress has legalized the *contract* validated by the State law, but not every provision of the statute. If, over and beyond the establishment of the legality of the contractual obligation to maintain minimum prices, the State statute otherwise authorizes conduct or procedure which runs afoul of a Congressional protection of interstate commerce from unlawful restraint, such as the appellant defendant here asserts to be true as to him, such provision of the State statutes must yield to paramount Federal law.

This Court has held that subsequent federal legislation is not to be construed as impliedly limiting the scope or application of the federal antitrust laws in the absence of a clear statutory expression of such limitation. *United States* v. *Borden Co.*, 308 U. S. 188, 198-199, 203-206; *U. S. Al-*

[4] See petition for certiorari, pp. 11, 18.

kali Association v. *United States*, 325 U. S. 196, 206-211. The expanded interpretation of the Miller-Tydings Act adopted by the court below would be justified, if at all, only if plainly required by legislative history. But on the point in issue, legislative history gives no clear or even persuasive indication of congressional purpose. In the court below both the majority opinion and the dissenting opinion rejected legislative history as a source of guidance (Calvert, R. 101, 103).

For the reasons stated, it is respectfully submitted that the petition for certiorari raises an important question of federal law which warrants review by this Court.

PHILIP B. PERLMAN,
Solicitor General.

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